Commercial Awards Protected as Investments under International Investment Treaties: A Challenge for ISDS Arbitration

Andrés Felipe Lucumí Asprilla

Externado University of Colombia

Author Note

Andrés Felipe Lucumí Asprilla, Faculty of Law, Externado University of Colombia

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Correspondence concerning this article should be addressed to Andrés Felipe Lucumí Asprilla.

Contact: andres.lucumi@hotmail.com

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INTRODUCTION

International Investment Law has always been a matter of controversy from the gunboat diplomacy to the time of International Investment Agreements (IIAs). The protection of foreign property, the diplomatic protection and the promotion of foreign investment in countries have all being subjected to heavy scrutiny before they have been accepted.

1. The relationship between commercial and investment arbitration: Origins of international arbitration

The development of international law dates back to the Middle Ages, from the philosophy of law developed at that time to the present, we can demonstrate the development of arbitration. With this object, and to understand the relationship between investment and commercial arbitration, I will address (1) the evolution of international commercial arbitration; (2) the emergence and evolution of international investment arbitration; and (3) the relationship between both of them.

1.1.Origin of commercial arbitration in international law.

Since the middle ages, in order to promote the settlement of transactional controversies, the judgments have been directed to arbitral awards. Thus, arbitration turned into a mechanism that has exponentially increased its use more than 500 years ago (Grotius, 2005), not only because of the so-called ‘globalization’ which has connected the world economies from the 20th Century, but also regarding the peace and global stability among nations from the 18^{th} and the 19^{th} Centuries. Thus, efforts on peace have strengthened international arbitration as a dispute settlement mechanism without any precedent.

This mechanism is conceived to secure the settlement of disputes based on the principle *pacta sunt servanda.* As so, not only the competence of the arbitral tribunals, but also, the consequences of their awards were conceived to only have effects among the parties.

In this sense, the enforcement of commercial awards took a cornerstone development after the mid-20th Century when 160 countries adopted the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). This convention was conceived with the purpose that any arbitral award rendered in the territory of the signatories could be recognized in any of their jurisdictions, restricting the refusal of such recognition to specific transgressions of the rule of law (Myburgh & Paniagua, 2016).

After the New York Convention, the recognition of awards acquired a preponderant role in international arbitration. Mainly, because the countries that signed this convention allowed the recognition of a foreign award in any of their jurisdictions, regardless of the seat where it was rendered. Furthermore, because the probability of obtaining a favorable execution was higher than without the Convention. Consequentially, as stated in the *International arbitration survey 2018*, the most valuable characteristic of arbitration for practitioners is the enforceability (recognition) of the award (White & Case, 2019).

1.2. Origin of investment arbitration in international law

Contrary to the development of commercial arbitration. The development of the protection of foreign investments through IIAs starts in 1957 by the conclusion of the

Germany – Pakistan BIT, which did not conceived ISDS arbitration . For the next five years Germany would be the only country in the world that will conclude investment agreements, and it would be until 1961 that Switzerland and Tunisia will sign the first agreement in which Germany is not a party (UNCTAD, 2019).

In the middle of the 1960s, the conclusion of IIAs raised substantively. The most common causes to the conclusion of these agreements conducts to the protection of private property from expropriation, unfair or inequitable treatment by host states or the blocking of capital transfers. At this time, the agreements enriched a new field of international law: International Investment. Which, on the 1970s will achieve the first treaty that conceives the ISDS mechanism.

This kind of procedures achieved a major development in 1966 when the Washington Convention was concluded. The International Centre for the Settlement of Investment Disputes (ICSID), based on its Convention's rules and procedures, has promoted and encouraged the development of IIA-based arbitration towards the last half of a century in the world. From this point over, a lot of investment tribunals referred to ICSID as a dispute settlement mechanism.

As a result of this major achievement, the development of investment arbitration has been made in two benches: on one side, the arbitration based on the ICSID Convention and on the other, the *ad hoc* or *institutional* proceedings based on different procedural rules.

This difference acquired specific relevance regarding the definition of the term investment in IIAs, this, since it is the core of the Investor – State dispute settlement mechanism. This definition offers the elements for a tribunal in order to determine whether it has or lacks jurisdiction over an IIA-based dispute (Guzman Martinez, 2019).

1.3.Relationship between commercial and investment arbitration.

It is based on the aforementioned Washington Convention of 1966 when it is observed that a new category of arbitration arises as itself. As a result, there would be a field of arbitration under which the New York Convention will no longer be the most important basis for the recognition of international arbitration awards.

On the contrary, based on this new convention, the recognition of awards in proceedings against the states will be direct. Therefore, it will be understood that an award based on this Convention has direct recognition in the local legal system, as a final decision given by the Supreme Court of this state. In this sense, ICSID Convention states in article 54 that "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State".

It is here that the relationship between international commercial arbitration and international investment arbitration has a meeting point. As I mentioned, the most important characteristic for a practitioner is the recognition and execution of his award. In this sense, many of the arbitrations that took place awaiting recognition based on the New York Convention began to be carried out based on the Washington Convention.

2. Definition of an investment in IIAs

In order to define an investment, arbitral tribunals adopt different approaches. The most common approach relies firstly on the interpretation of the IIA. It requires that the investment in question complies with the definition stated in the respective *single approach* of the IIA. Secondly, there is an approach based on the ICSID Convention, which requires the complainants to fulfill the definition of investment in the IIA, as well as, the definition established in Article 25 of the ICSID Convention. This approach is known as the *double keyhole* (or *double-barreled*) *approach.* (Dolzer & Schreuer, 2012)

2.1.Single approach.

The first approach *(single approach)* is based on the expressed will of the states in the IIA. As such, the freedom of the parties' principle of international law allows the parties to include a definition of investment that can be broad or narrow (United Nations Conference on Trade and Development, 2011). This consequence will take place whether the parties agree with a traditional definition based solely on 'assets', 'acquired rights' or 'foreign property', or include limitation clauses such as the enterprise-based, commercial presence, reinvestment or change in the form of an investment definition.

These limitation clauses restrict the scope of competence for a tribunal. The main form in which the definition could be restricted is when parties establish an exhaustive list on the assets that constitutes an investment, specific exclusions, prohibition of 'portfolio investments', 'certain commercial contracts, loans, debt securities, or assets used in a non-business purpose (United Nations Conference on Trade and Development, 2011).

The second approach for an investment definition (*double keyhole* or *double barreled*), requires further steps to include a protected investment in the jurisdiction of a tribunal. As stated, ICSID tribunals are required to find out if an investment is considering the Article 25 of the ICSID Convention and the definition on the IIA. However, regarding the ICSID Convention, drafters, intentionally, have left the concept of investment without any specific definition (McLahan, Shore, & Weiniger, 2007). The article commonly states as follows:

"*The jurisdiction of the Centre shall extend to any legal dispute* *<u>arising directly out of an investment</u>*, *between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State*". (Italics and underlying out of the original)

This intentional omission to define the concept led to disparity among ICSID tribunals. Moreover, consequently, tribunals have developed different approaches that lead to the interpretation of the Article 25. Some of them state that the drafter's intentional omission makes a cross-reference to the IIA definition while other tribunals have properly looked for the definition of investment under the Convention (Guzman Martinez, 2019).

2.2.Double keyhole approach: Development by ICSID tribunals.

There is still no unity in the tribunals understanding due to the diversity of approaches (Guzman Martinez, 2019). The tribunal in the case of *Fedax v. Venezuela* of 1998 came up with the first theory based on what constitutes an investment when the controversy over the definition of investment raised. It stated that the definition includes certain duration, regularity of profits and returns, a risk, substantial commitment of capitals and significance to the state's development (Fedax v. Venezuela, 1997). This understanding, which evolved and has crystalized in the case of *Salini v. Morocco,* stated that an investment must include a substantial commitment, by the investor, a certain duration, assumption of risk and significance to the state development (Salini v. Morocco, 2001). These elements are based on the economic understanding of the term investment (Dolzer & Schreuer, 2012).

Moreover, investment arbitration tribunals adopted this criterion after *Salini v. Morocco* and the elements for define an investment came to be known as the *Salini Test.* Once the definition of investment is accomplished under Article 25 of the Convention, the second step for ICSID tribunals, which is an analysis based in the IIA takes place. This is equivalent to the only step on the non-ICSID tribunals, which is the fulfillment of the specific definition of investment in the IIA (Guzman Martinez, 2019).

The investor's substantial commitment has been understood to be represented as money or assets (Grabowski, 2014), the former as an 'investment of capital' (or portfolio investment) and the latter as a 'direct investment' (Duce, Maitena; Banco de España, 2003). This based on the particular elements that compose the concept of investment in light of the Article 25 of the ICSID Convention. The length of the investment refers to a long-standing term in which the project is implemented (Grabowski, 2014). Moreover, the assumption of risk is a common element involved in definitions and thus, required by tribunals in order to understand the presence of an investment (United Nations Conference on Trade and Development, 2011). Finally, the significance contribution for the development of the host state has been an element of controversy among investment arbitration practitioners. There is no collective agreement on this point (Grabowski, 2014).

In this sense, over the first decade of the XXI century there has been an outgrowth of international investment claims based on the non-recognition of an arbitral commercial award rendered in a country that adopted the New York Convention. These proceedings have in common that most of them was claimed the transgression of the due process principle of international law in the context of an investment treaty by the actions of the judiciary over enforcement proceedings.

Moreover, the plaintiffs' intention on such proceedings is that an investment tribunal finds the existence of an international wrongful act (due to process violation) based on the actions of the judiciary. Claims relying on the rule of *non-internal law reliance under international law*. Finally, they demand 'to recognize' the amount rendered in the commercial award as an award in the investment proceeding.

3. Purpose of this research Paper

Considering that the recognition of awards that have been denied by domestic law, but which has then been arbitrated under the ICSID Convention, can be later understood as recognized in domestic law because of the ICSID award's nature, and the referred development of the relationship between commercial and investment arbitration.

The purpose of the present research is to study the development in which have been based the claims that have resulted in the acceptance of international commercial awards as investments. Concluding that the commercial awards can or cannot be protected as investments under the framework of international investment arbitration on each case basis.

In order to achieve such a purpose, the present research will be focused on the definition clauses of IIAs and its interpretation by international investment tribunals. Mainly, because the recognition of commercial awards as investments is based on these clauses, either if the tribunals have adopted or have denied the recognition.

4. State-of-the-art

The subject of the present research has been reviewed few times before. Different authors have discussed the issue from different perspectives. This is the case of Classmeier (2016), who studied the issue from the context of the philosophical treaty interpretation, mainly considering the roots of public international law roots, the sources of international law considering international treaties and investment contracts, a critic on the interpretation insufficiencies regarding policy theories and potential routes to improve treaty- interpretation methods.

There is a second group of authors which studied the consideration of awards as investments for the purposes of jurisdiction in an investment arbitration considering only two or three decisions and considering only the political nature regarding the recognition of the category. This is the case of Mansinghka & Sanjana (2017), Myburgh & Paniagua (2016), Priem (2013) and Ampudia (2015).

Also, there is a third group of authors, which have analyzed the subject matter based only on one case or from a different perspective as denial of justice or implications of the New York Convention. This is the case of Sattorova (2012), Khanna (2015), Pranshu (2013) and Kimerling (2013).

The author acknowledges that the state-of-the-art of the present investigation indicates that the matter has similarly been studied previously. However, the state-of-the-art, which is also quoted in the present document, has absent to address the matter as the author does. Firstly, because it has omitted to resort to decisions that have directly recognized awards as investments as the *Anglia v. Czech Republic* decision. Secondly, because the subject matter has not been analyzed with the method applied in the present case, a decision-based analysis, differentiated between the recognition of the awards as investments by themselves and the recognition among different clauses.

As a result, the approach in the present document contributes to the recognition of the commercial award as an independent category of investment and not as other authors linked to a particular asset.

Moreover, the conclusions of the author allow to identify challenges that have not been expressed before regarding the subject-matter. The expressed exclusion of awards as investments is the main challenge and requirement for drafters and negotiators of IIAs that will be analyzed. The aforementioned, considering article 54 of the ICSID Convention.

5. Methodology of the research

The methodology adopted in the present reseach is based in a decision-based analysis of the awards that have considered a study of an award conceived as an investment. Taking into account this, the methodological question that will be researched is whether a commercial award can be protected as an investment under international investment treaties.

As mentioned, the document is divided in two sections. In both of them, the structure allows to identify on the first place the concept that will be developed, which will be whether the commercial awards can or cannot be protected as investments. Then, the categorization of the concept followed by an analysis of the arbitral awards that have adopted the concept. However, each of them will address the opposite subject matter regarding the recognition.

Moreover, each of the categories is represented by a graphic, which is a representation with the purpose of identify how the different theories regarding definitions and categories have been developed. Thus, is a visual support for the theories adopted by the tribunals.

Finally, on the conclusions there is a categorization of the decisions analyzed in the document adopting the methodology of López Medina (2006) from the recognition till the non-recognition. Moreover, the conclusions also develop the findings on the different categories analyzed in the present document.

6. Workplan

The research is based in two sections. The first one will adopt the 'positive theory', regarding that arbitral awards can be conceived as investments. In this section the common definitions are studied with the inclusion of theories that have been developed by tribunals mainly to give recognition to the category.

The common definitions that will be studied are contained in the clauses of: "every kind of assets"; "claims to money and claims to performance contracts having a financial value"; "claims to any other rights to legitimate performance having a financial value related to the investment”; and “transformation of the investment”. Moreover, the theories that have been adopted regarding the recognition, which are the “crystallization theory” and the “whole investment theory”.

In the second section, the ‘negative theory’ is studied. At this point, it will be analyzed the development regarding that arbitral commercial awards cannot be concieved as investments. This section focuses on the requirements that tribunals have developed regarding the definition of an investment, as well as, the particular case of an enforcement of an award that was claimed as a breach of an IIA.

The main requirements that have been developed the definition of an investment that will be considered in this section are based on the *double-keyhole approach,* mainly on the “assumption of risk”, the “duration of the investment” and the “contribution to the development of the host state”. Moreover, the lack of enforcement as a breach will be analyzed considering the particular claim developed by two European states claiming that the recognition breach the treaty and towards investment arbitration it was pursued the non-recognition.

SECTION ONE. POSITIVE THEORY: ARBITRAL AWARDS CAN BE PROTECTED AS INVESTMENTS

The definitions of an IIA constitute one of its most important sections. It is in this article of the IIAs where the basis for clarification of the clauses in a treaty can be located. Furthermore, it is here where I primary find the meaning of a contribution, and therefore, the grounds for the investment protection (Mansinghka & Sanjana, 2017).

Thus, a major challenge is faced by the tribunal considering the recognition of a commercial award as a investment. As stated in the introduction, to declare its jurisdiction over a controversy, a tribunal must find that an asset, in the present case, a commercial award complies with the definition of the IIA. Likewise, an ICSID tribunal must find that the commercial award by itself complies with the adopted standard or criteria concurring with the IIA. Otherwise it lacks jurisdiction.

In the present Section, we will consider the definition clauses that have concluded in the award's recognition as an investment. Likewise, the theories that tribunals have adopted to achieve the purpose of granting jurisdiction over claims include an award. Particularly, the theories that we will consider are (1) Crystallization theory; and (2) Whole investment theory.

1. Definition clauses

Regardless of the approach that practitioners adopts, the notion of awards as investments requires the fulfillment of the IIA’s definition. In this sense, in the present sub-section, we will approach the most common definition clauses. These include: (1) every kind of asset clause; (2) claims to money and claims of contracts having a financial value clause;

(3) claims of any other rights to legitimate performance having a financial value related to an investment clause; and the so called (4) “transformation” clause.

1.1. “Every kind of asset” clause.

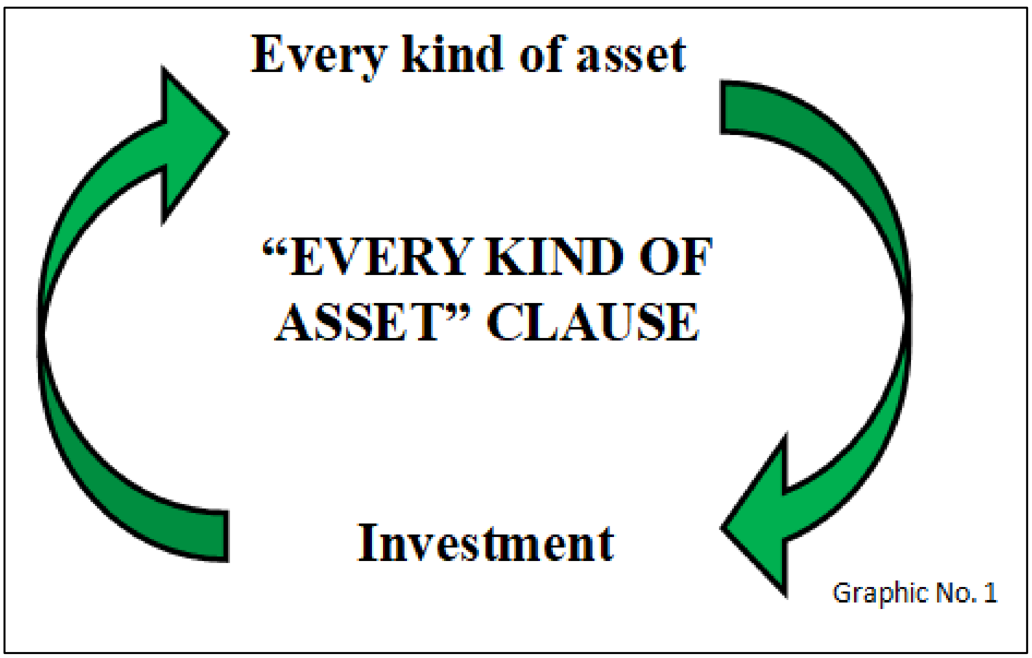
The most common definition, including an extensive interpretation of the term “investment”, comprises the single definition of “every kind of asset”. Commonly, this definition states that: “The term ‘investment’ means every kind of asset invested by investors of one Party under the laws and regulations of the other Party in the latter's territory […]” (United Nations Conference on Trade and Development, 2011)

Earlier decisions of claims related with breaches of IIAs based on commercial awards as investments were focused on the exclusive analysis of whether the economic project *per se* made an investment. This due to a denial of justice over a commercial award. Nevertheless, in recent years, tribunals have analyzed whether the commercial award constitutes an investment (Ampudia, 2015).

Tribunals have developed this trend because the claims that involved a commercial award submitted that the State had either refused the enforcement, annulled the award or revoked the commercial arbitration competence (Ampudia, 2015). As a result, the investment dispute regarded the notion of the award rather than in the economic transaction in which the investment had been made.

Based on this, the language of the definition clause in the underlying IIA is crucial to figure the role of the commercial award in the proceedings (Mansinghka & Sanjana, 2017).

First, based on the "every kind of asset" definition of an investment, an asset may be "anything that is of value" and therefore belongs to someone or something. Derived from this definition, and regardless of the approach, an arbitral award is valuable and thus, based on the "ordinary meaning" constitutes an asset (Classmeier, 2016). In addition, international tribunals as the European Court of Human Rights' have understood that a commercial award is an asset object to property of the parties when is "sufficiently established to be enforceable" (Kin-Sib and Maijic v. Serbia, 2010).



- *Recognition as an asset in conjunction with the investment.*

For instance, in the case of *ATA v. Jordan* the tribunal recognized that an arbitral award constitutes an autonomous asset of the investment that is materialized in the right to arbitrate of the investor. The tribunal stated that the right establishes a different investment over which it has jurisdiction, being the award an autonomous and the main asset of it. As a different investment, the tribunal stated that it could constitute independent breaches of the treaty's provisions. (ATA v. Jordan, 2010)

Likewise, the tribunals in the cases of *Gavazzi v. Romania* and *Saipem v. Bangladesh,* which are later address, concluded that the award establishes an independent asset considering the "every king of asset" definition. This time in the context of the overall investment. These cases precede the acceptance of the Anglia tribunal of an investment.

- *Anglia v. Czech Republic.*

A decision that remarked the perception of an award as an investment *is Anglia v. Czech Republic*, in this case, solved by a tribunal made up under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce, the Claimant, Anglia Auto Accessories Limited, concluded a Joint Venture Contract with the state-owned company Kyjovan in the Czech Republic.

After several differences between both companies referring to the joint venture, Anglia initiated commercial arbitral proceedings against Kyjovan, as provided on the Joint venture contract. On 1997, the tribunal found in favor of Anglia for a sum of CZK 4.8 million. Afterward, Anglia submitted enforcement proceedings in the Czech Republic.

The enforcement proceedings remained unsolved. On September 2012, Kyjovan declared itself in insolvency and therefore the state liquidated it. As a result, the company was withdrawn from the commercial registry of the Czech Republic. Hence, Anglia filed the investment arbitration proceedings claiming that the delay in the judicial authorities on the enforcement proceedings from 1997 to 2012 amounted to an indirect expropriation of the award.

Even though the Tribunal rejected the claims on the merits, it found that it had jurisdiction because the term ‘investment’ under the Bilateral Investment Treaty (BIT) between United Kingdom and the Czech Republic (UK–Czech BIT) is broad, covering ‘every kind of assets belonging to an investor of one contracting party in the territory of the other Contracting Party in any sector of economic activity’” (Anglia v. Czech Republic, 2017).

Afterwards, the Tribunal stated that “Under this definition, a final and binding arbitral award granting damages qualifies as an ‘asset belonging to an investor’” (Anglia v. Czech Republic, 2017). As a result, the Tribunal itself was the first in investment arbitration that directly recognized an award as an investment. It supported its assertion on the recognition that not only the award complies with the definition incorporated in the UK–Czech BIT, but still that it is a claim to money or to perform a contract having a financial value, one notion that the parties on the BIT recognized that an investment can adopt.

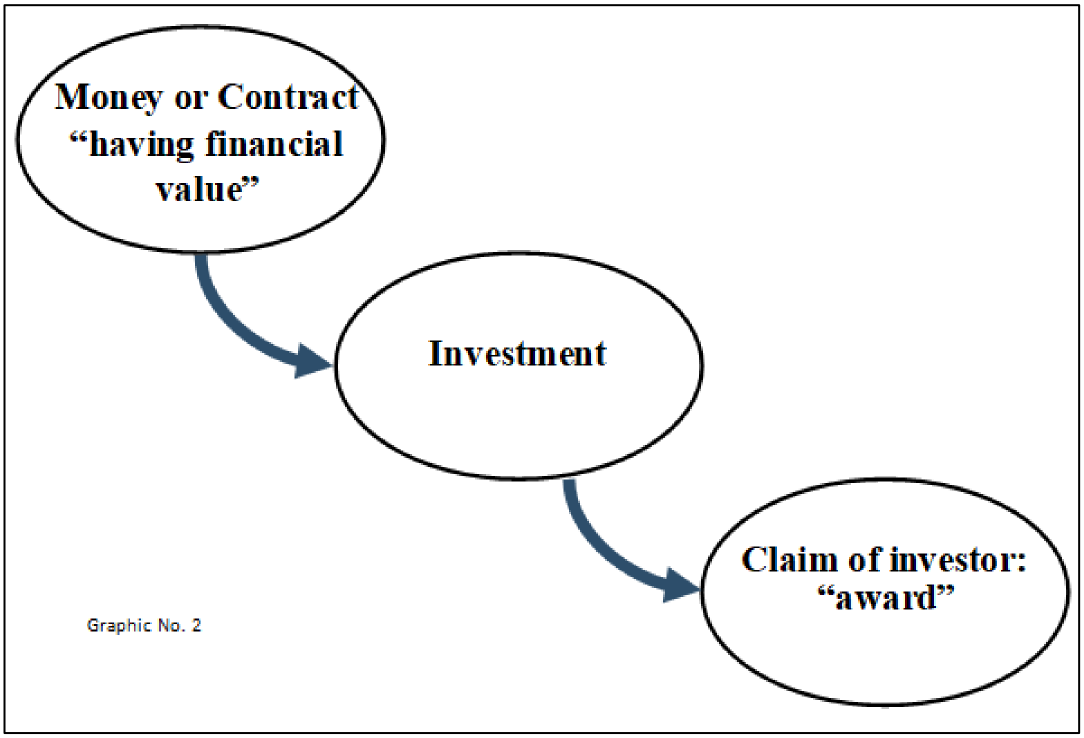
In short, the specific words included in the IIAs opened the door to include the notion of awards as investments. The “every kind of asset” clause is the basis on which tribunals have found that an award by itself constitutes an investment, considering that *Anglia v. Czech Republic* is the last-known case of an ICSID tribunal.

1.2.“Claims to money and claims to performance contracts having a financial value” clause.

A less common definition of investment, but still a broad asset interpretation, is the one that includes the *claims to money* or *contracts having a financial value* clause. The common clause states: "investment […] includes: […] claims to money and claims under a contract having a financial value" (United Nations Conference on Trade and Development, 2011). As a result, tribunals have adopted the interpretation that "claims to money" or "claims of contracts having a financial value". It constitutes a solid basis to understand the incorporation of the commercial awards in the IIAs.

Such has been the case of the ICSID tribunals in the cases of *Saipem v. Bangladesh* and *Gavazzi v. Romania*, which, based on the former definition, we can consider the award as an investment based on the Article 25 of the ICSID Convention.

In the same way, non-ICSID tribunals, dealing only with the IIA definition, arrived in the same conclusion. For instance, the tribunal with *White Industries v. India*.



Graphic No. 2

- *Saipem v. Bangladesh.*

The very first case on investment arbitration to recognize an award as an investment was *Saipem v. Bangladesh.* This case, decided by Gabrielle Kaufmann-Köhler, Christoph Schreuer and Sir Philip Otton, makes a disruption in investment arbitration and opens the gate to the development for the concept of investment based on commercial awards.

By doing so, the tribunal not only faced with the position to argue the existence of investment considering the Italy–Bangladesh BIT, but also, it stated that such a situation regarding the ICSID Convention. However, it differs from the conclusion in *GEA v. Ukraine*, which will be further analyzed. The tribunal did not resort to the independent asset application, but to the open definition of investment in the ICSID Convention. As a result, they opposed the conclusions among both tribunals, and this tribunal found jurisdiction.

Saipem and the State-owned entity Petroblanga concluded the case, raised in a construction contract. The purpose of the contract was to construct a gas pipeline in the north region of Bangladesh. Once the construction was complete, a dispute arose regarding the accomplishment of the payments due to Saipem by Petroblanga. Saipem started a commercial arbitration under the auspices of the International Chamber of Commerce (“ICC”) awarded in its favor (“ICC Award”).

However, while the proceedings were in progress, the Supreme Court of Bangladesh issued an injunction restraining Saipem from proceeding with the commercial arbitration. The decision wasn’t recognized by *Saipem*. Therefore, the Court of Dhaka issued an injunction revoking the authority of the ICC tribunal in the commercial arbitration. This decision was also not recognized by the ICC tribunal.

After it rendered the ICC Award, Petroblanga started a proceeding requesting to set aside the award. However, the response of the Supreme Court of Bangladesh was to deny the application since there was no basis for state that there is an existent and valid award since the injunction was validly rendered and the Court of Dhaka revoked the ICC tribunal jurisdiction. As a result, Saipem started to issue investment proceedings.

The investment tribunal dealt first with the recognition of the award as an investment considering the Italy–Bangladesh BIT. In doing so, the tribunal states that the definition of the treaty was broad. It recognizes the investment as “any kind of asset”, and that the rights of the ICC Award are not created by the award, but those aroused out of the contract. Likewise, these contract’s rights were the representation of the whole investment and therefore constitutes an investment under the treaty. (Saipem v. Bangladesh, 2007)

Regarding the accomplishment of the ICSID Convention definition, the tribunal stated that it would apply the *Salini test*, for which it will follow all the elements. The technique adopted by the tribunal was not the consideration of the award by itself, but the entire operation. It included contracts, the construction itself, the warranties and the ICC Award. At the end it’s been found that it has jurisdiction since the award fulfills both of the definitions of investment. (Saipem v. Bangladesh, 2007).

- *Gavazzi v. Romania: The Bridge between an autonomous investment and an element of the investment.*

The case of *Gavazzi v. Romania* constitutes the last known decision rendered by an ICSID tribunal regarding the interpretation of an award as an investment. The tribunal faced a controversy in the end's frame of the Soviet Union and the constitution of Romania as an independent state. In this process, the Romanian executive bench was privatizing most of its companies. So was the case with the steel company "Socomet".

The government of Romania, Marco and Stefano Gavazzi agreed on purchasing 70% of the state steel company with the condition of renegotiating the corporation's debts (share purchase agreement). After the government agreed and presented the accomplishment of its obligations to the investor, the Gavazzi brothers gained the company. However, once they started to develop the re-structuration of the company and started the investment, noticed that the state did not comply with the obligation of renegotiating the debts. The accounts of Socomet were frozen, and they directed the income to the payment of debts with governmental agencies.

As a result, the parties started commercial arbitration based on the differences in the performance of the contracts. The tribunal found in favor of the Gavazzi brothers, and the Bucharest Court of Appeals annulled the award adjudicating that the state shall keep the amounts paid by the brothers. The Romanian Court of Appeals further confirmed the decision.

The Gavazzi brothers started investment arbitration claiming the breach of the Italy–Romania BIT. The arbitral tribunal, by a majority, found that the award which compensates the investment made in the host state, made up a "claim to money" covered by the BIT as an investment. (Gavazzi v. Romania, 2015)

In its reasoning, the tribunal firstly addressed the recognition of the award as an investment on the IIA (Italy–Romania BIT). On this respect, the tribunal concluded by a majority that the award compensated the investment and therefore constituted as an invested asset. However, the tribunal recognized, even though the accomplishment of a direct recognition, that the award as investment was constituted because it could consider it a “claim to money”. Concept covered in the Italy–Romania BIT as a notion of what constitutes an investment (Gavazzi v. Romania, 2015).

Regarding the definition of Article 25 of the ICSID Convention, the tribunal adopted the position that it does not define the concept of investment in the Convention. As a result, it directly links the definition of the Convention with the definition of the BIT. Giving that circumstance, the award considered as a part of the overall investment constitutes an investment (Gavazzi v. Romania, 2015).

Even though the tribunal refrain to maintain its assertion that the award made up an investment by itself. The last development of an ICSID tribunal recognized the possibility that an award is an investment, whereas the IIA recognizes a claim of money as an investment.

- *White Industries v. India: The most relevant precedent of a non-ICSID tribunal.*

By far, the case of *White Industries v. India* constitutes the most cited, analyzed and claimed case through the investment community. The *Ad hoc* tribunal made up by the UNCITRAL rules of arbitration not only recognized that an award can be consider as an investment because of the provisions on the particular IIA (Australia–India BIT), but it also made a heavily critic regarding the tribunal of *GEA v. Ukraine,* which denied the recognition.

The controversy arose from a contract for the supplement of coal machinery concluded between White Industries Australia Limited and the Indian company Coal India. In the contract, the parties agreed that Coal India should give a specific amount of coal. However, since the requirements were not fulfilled, White Industries filed commercial arbitration based on the supplement agreement.

The tribunal found in favor of White Industries in 2002. By that time, White industries filled to enforce the award on the High Court of New Delhi. However, Coal India applied for the annulment of the award on the High Court of Calcutta. After 8 years of enforcement and annulment proceedings and no final decision have been rendered, White Industries filled for investment arbitration.

On its reasoning, the investment tribunal dismissed the consideration of the award as an independent investment. However, without hesitation, the tribunal stated that it constituted an asset and therefore an element of the original investment. Doing so, the tribunal based its assertions on the *Saipem v. Bangladesh* theory of investment, which will be further analyzed on the reasoning of the transformation clause (White Industries v. India, 2011). Likewise, the tribunal stated that based on the judicial conduct, the actions of the judiciary over an award may constitute a breach to an IIA as it was found by the tribunals in the cases of *Mondev* (Mondev v. USA, 2002), *Chevron* (Chevron v. Ecuador, 2012) and *Frontier Petroleum* (Frontier Petroleum v. Czech Republic, 2010).

Finally, the tribunal stated that the reasoning on the case of *GEA v. Ukraine*, which denied the recognition of the award as an investment was an *obiter dictum*. The tribunal, more than analyzing the award as an investment, did not recognize that it is an element of the investment, and under such category made up an investment. Either way, the *White Industries* tribunal differentiates its case from *GEA*, because most of the investment in the former case cannot be considered as an investment, this due to its contractual circumstance. Therefore, that the decision of the *GEA* tribunal shouldn't be considered (White Industries v. India, 2011).

The result on the *White Industries* decision not only became a high relevance award in investment arbitration but also in the whole country of India. Even though, the decision of the investment tribunal was considered as legal and complied with the constitution of India (Pranshu, 2013), the ministry of finance stated that "[there is a] concern that the judgments of the highest Court in the country are being subject to international arbitration". The Australia-India BIT was denounced in 2017. It is interesting to see how the government complied with the White Industries award while the enforcement proceedings of the commercial award were still not concluded (Khanna, 2015).

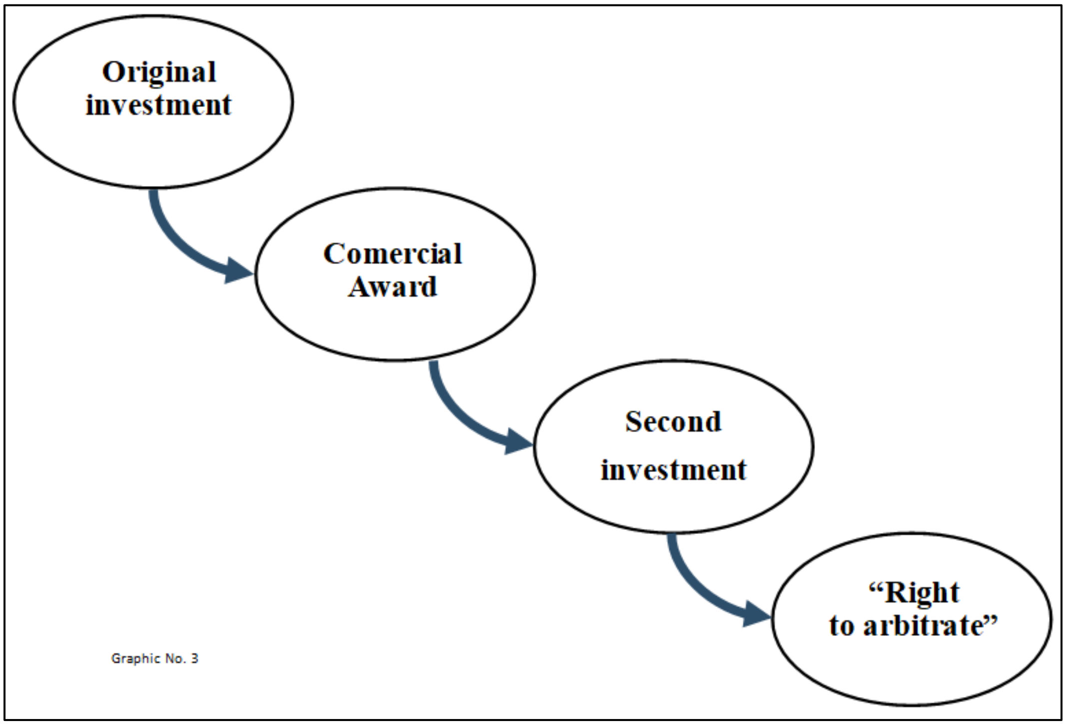
Nowadays, India expressly excludes the commercial awards of investments regarding of the 2015 India Model BIT in the following terms: "*For greater clarity, investment does not include the following assets of an enterprise: (…) (vii) an order or judgment sought or entered in any judicial, administrative or arbitral proceeding (…)*" (United Nations Commission on Trade and Development, 2019). This result, among others, will be further analyzed in section two of the present article.

1.3. "Claims to any other rights to legitimate performance having a financial value related to an investment" clause.

An even more uncommon definition of investment states: *rights to legitimate performance having a financial value* (United Nations Conference on Trade and Development, 2011). Treaties usually include this clause as: "investment […] includes […] claims to money and any other rights to legitimate performance having a financial value related to an investment" (Mansinghka & Sanjana, 2017).

The difference with the above-mentioned clause of "claims to money and claims to performance contracts having a financial value" is absolute. While in the first case the protection extends to 'any' right that can be measured in financial value, the second one only refers to performing contracts.

Therefore, it is so uncommon to find these clauses because the notion of 'any' right could be ambiguous. Reviewing the model BITs issued of the last ten years (from 2008 until 2019) only three out of twenty-six includes the clause, and only one out of eleven in the last five years have included it. The models that includes it are: 2008 Austria Model BIT (Austria Model BIT, 2019), 2009 Macedonia Model BIT (Macedonia Model BIT, 2019) and 2016 Czech Republic Model BIT (Czech Republic Model BIT, 2019).



- *ATA v. Jordan: A right to arbitrate considered as an independent investment*

The above-mentioned situation was the case of *ATA Construction v. Jordan*. The tribunal faced two different issues in this case regarding the recognition of a commercial award as an investment. First, whether the fully development of the investment has been done before the entry into force of the Jordan–Turkey BIT or not, and therefore if the award may be an investment, in the light of the *ratione temporis,* and, *ratione materiae* requirements. Second, the tribunal analyzed the issue of whether there is a “right to arbitrate” in the BIT and if so, whether it covers the *ratione materiae* scope of the tribunal.

The case arose in the frame of a construction contract concluded between ATA Construction and the Arab Potash Company (APC). The construction comprehended the edification of a dike over a portion of the Dead Sea. Once ATA completed the construction, APC filled the dike with water. While it was doing so, a specific section of the dike collapsed.

Consequentially, APC started a commercial arbitration against ATA Construction, which also claimed reparation under the auspices of the International Federation of Consulting Engineers (FIDIC).

The FIDIC tribunal absolved from any responsibility to ATA over the collapse of the dike and partially conceded its counterclaim regarding the retained sums on the construction contract.

Consequentially, APC filled the case to the Jordanian Court of Appeal, requesting that the Court set aside the award. That claim was granted by the tribunal. Furthermore, ATA Construction appealed to the Jordanian Court of Cassation which upheld the Court of Appeal's decision.

As a result, ATA filed an investment arbitration under the ICSID Convention claiming that by setting aside of the award, the judicial bench made up a violation of the BIT and therefore, it claimed a compensation equal to the amount of the FIDIC Award.

Regarding the former issue, the tribunal concluded that since the Turkey–Jordan BIT was concluded after the annulment proceedings of the FIDIC award, it lacked jurisdiction *ratione temporis* over the controversy.

However, regarding the particular arbitral award, the tribunal concluded that it had jurisdiction *ratione temporis* derived from the decision of the Jordanian Court of Cassation since the decision of the court not only confirmed the Court of Appeals decision, but it also declared that the contract was extinguished and therefore it constituted a breach of a different investment.

Augmenting its decision, the tribunal stated that:

"*it is not unusual for 'measures' with respect to the same investment to give rise to claims of different violations of a BIT and different defenses by the respondent State, and likewise for tribunals to find that there were violations on some measures and not on others*". (ATA v. Jordan, 2010)

While the tribunal analyzed whether considering the Contract's extinguishment, the award made up an investment; the tribunal found that considering the ICSID Convention, there is no definition regarding an investment. As a result, it is open to the parties, so it understood that by the BIT the parties are the ones that define the term investment.

Under the Turkey-Jordan BIT, the Tribunal concluded that the award constituted an investment since the definition of it included the term of "claims to money" or a "right to legitimate performance", which derived in the award as a separate element of a different investment from the one that gave origin to its outcome. (ATA v. Jordan, 2010)

Regarding this second issue, the tribunal concluded that "the right to arbitration is a distinct investment within the meaning of the BIT". Interpreting that since the definition of an investment comprehended the "claims to […] any other rights to legitimate performance having a financial value related to an investment", there was a different definition of an investment. Therefore, the tribunal concluded that there is no possibility to give a different definition to the right of arbitration as the one given by the BIT over claims to rights. As a result, the tribunal concluded that the right of arbitration was not in dispute until the Jordanian Court of Cassation decided to annul the contract. When the decision took place, a new investment in the terms of the BIT emerged. (ATA v. Jordan, 2010)

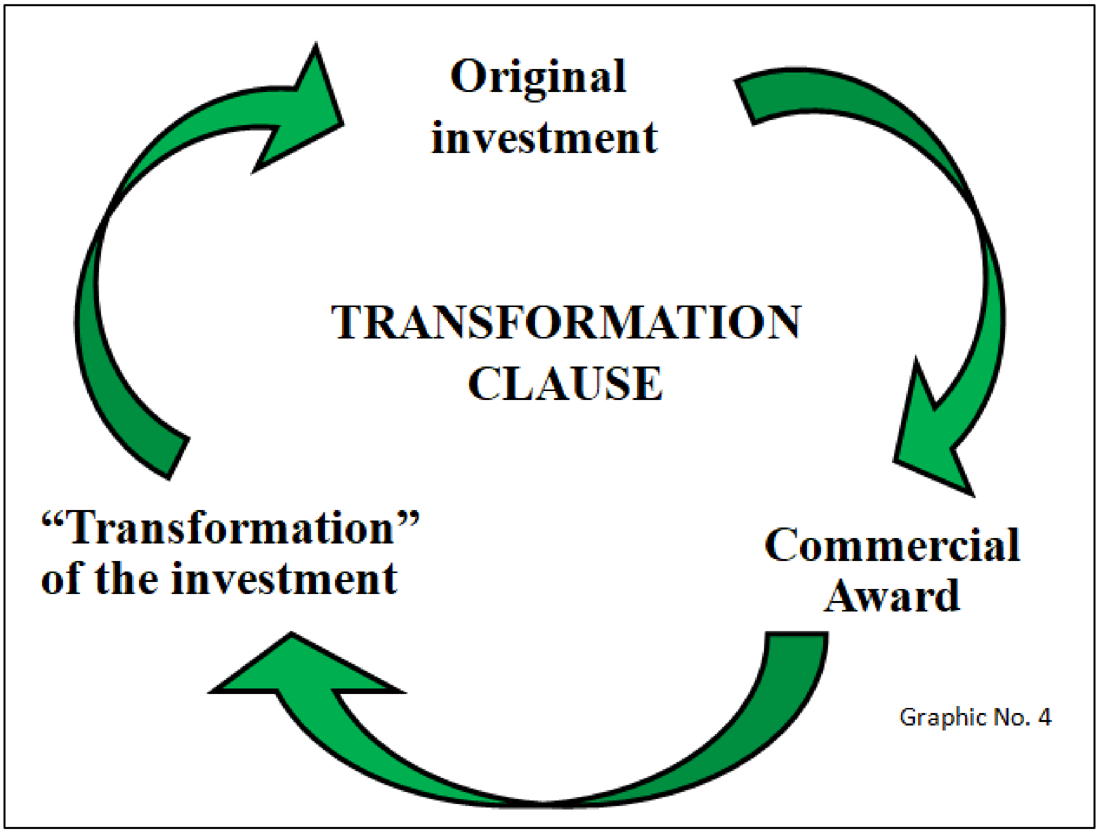
Because of the development made by the *ATA* tribunal, we consider the commercial award as an investment not only by itself, based on the definition of the BIT but also, because of the outrageous behavior of the judicial bench.

1.4.“Transformation” clause.

The “transformation” of an investment section is an uncommon clause included in several broad–definition IIAs. The common reference of these clauses states that: “A change in the form in which assets are invested does not affect their character as investments as long as they are covered by this definition” (United Nations Conference on Trade and Development, 2011).

This clause, rather than a definition of what an investment is, protects any changes in which the investment is developed. The presence of the clause can be a great incentive for investors to restructure how the investment is stablished without losing the treaty protection (United Nations Conference on Trade and Development, 2011). However, it also opens the door to consider claims over arbitral or judicial proceedings as a “transformation” of the investment.

Therefore, such a definition opens the door for interpretation. Hence, regarding the “ordinary meaning of the words” reflected in the Article 31 of the VCLT (Gardiner, 2008), the consequence of such a clause is that an investment that originally was considered as an amount of assets that involves a project, a business risk and a substantial time commitment, can after a commercial arbitration, be considered to become an award considering the IIA. Therefore, an investment tribunal will remain jurisdiction over a case hearing only of the commercial award.



- Frontier Petroleum v. Czech Republic: A different approach to understand that an award may constitute an investment.

The case of *Frontier Petroleum v. Czech Republic* makes a different approach to what has been the approach of the tribunals recognizing an award as an investment. Far from spotting the "crystallization" theory of the *White Industries* case or the "overall investment" theory of the *Saipem* tribunal. The tribunal in this case recognized that without regarding the definition of an investment, the original economic transaction constituted a protected investment and therefore it will also protect the transformation clause.

The case starts with the conclusion of a Joint Venture ("shareholder agreement") contract between Frontier Petroleum and Moravan Aeroplanes A.S., for manufacturing aircrafts. Given certain transgressions of the second company to the shareholder (purchase) agreement, Frontier Petroleum started commercial arbitration in Stockholm.

The Stockholm tribunal found in favor of Frontier Petroleum. However, the Czech Republic denied the recognition over the award. Therefore, Frontier Petroleum started investment arbitration proceedings before the Permanent Court of Arbitration based on the Canada–Czech Republic BIT.

The tribunal first stated that it shall find whether Frontier Petroleum developed an original investment under the Canada–Czech Republic BIT or not. By doing so, it concluded that the original investment comprised the payments made to the State entity and the Joint Venture contract. Since they accepted, an investment under the BIT, then an initial investment was made under the treaty (Frontier Petroleum v. Czech Republic, 2010).

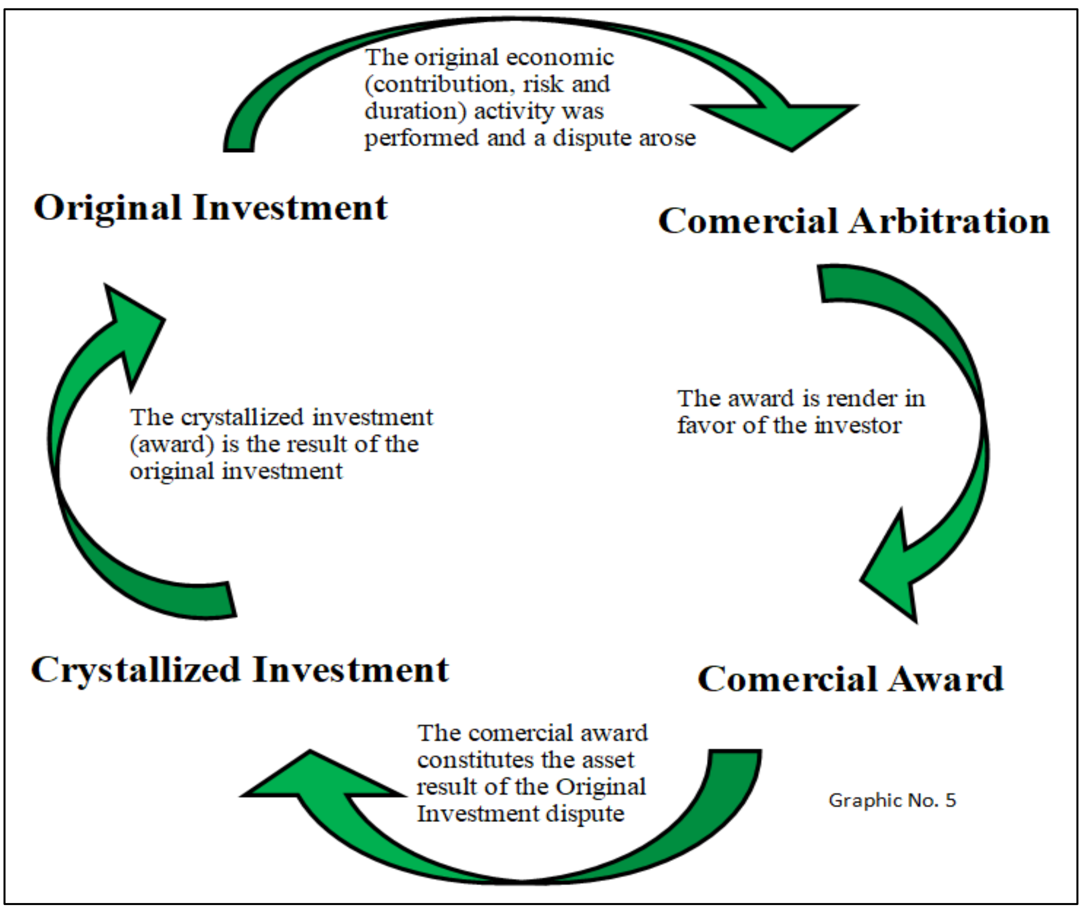
The tribunal states that the Article 1(a) of the Canada–Czech Republic BIT that any change in the form of the investments did not affect its character of investment. Hence, based on this article, it's been found that it classifies the award as an investment and therefore the tribunal has jurisdiction (Frontier Petroleum v. Czech Republic, 2010).

This recognition of the *Frontier Petroleum* tribunal contributed to the recognition of the award as an investment not only by the definition of investment but also based on the different considerations that the parties may include in the IIAs. However, the position over the recognition that the "transformation" clause covers awards is not unanimous. As will be further seen, with *Romak v. Uzbekistan*, the tribunal denied such recognition.

Likewise, together with the recognition of the award as an investment, the tribunals adopted different theories to understand awards as an element of the investment. It mainly reflects these theories in the Crystallization and “Whole investment” theories. In the following sub-sections, we will analyze these theories and its application.

2. Crystallization theory

A debatable theory which derivate in the recognition of an Award as an investment is the “crystallization” theory adopted by the tribunal with *White Industries v. India*, as stated above, the tribunal concluded that the award may be considered as an investment since it *crystallized* the parties' rights of the contract in the award.



To understand the rule of the tribunal, it is necessary to take into consideration two investment arbitration cases that deal with the issue. Both cases based on claims regarding denial of justice, the tribunals in *Chevron Petroleum v. Ecuador* and *Loewen v. United States*. These cases studied the extension of the principle of due process and how a judgment or a final and binding decision may turn into a claim in an investment proceeding.

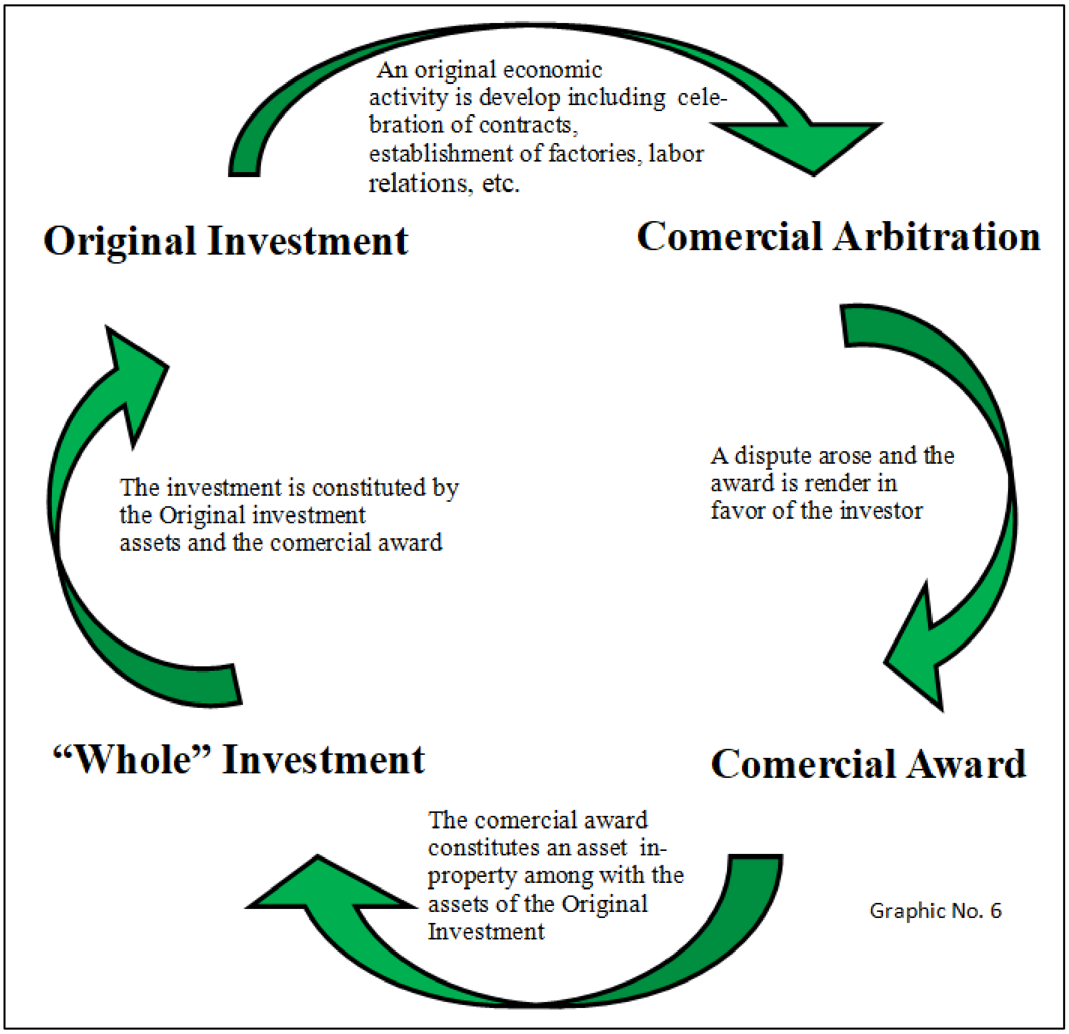
The tribunals have understood in the investment cases that the ultimate disposal of an investment is the materialization of the economic activity that was developed in the host state. As a result, a final and binding decision constitutes the crystallization of the investment. Likewise, to understand the application of the theory it is necessary that the parties certify the compliance with its transparency duties and the judicial breach caused by the other party (Rubino-Sammartano, 2014).

Still, even though this theory has been used by tribunals to understand the materialization of an investment and therefore its protection, regarding its requirements there are still differences between tribunals (Sattorova, 2012). For instance, while the tribunal in *Chevron* stated that the transgression does not require an exhaustion of remedies, the party certifies its futility. The tribunal (Chevron v. Ecuador, 2012), in *Loewen* stated that a complete exhaustion of local remedies is a non-disposal requirement because it allows the state to correct its actions (Loewen v. USA, 2003).

3. Whole investment theory

Parallel to the crystallization of the investment theory, tribunals have resort to the “whole investment” theory (also known as the “unity of investment” doctrine) to determine whether an award may classify as an investment. Like the tribunals of *Saipem v Bangladesh*

(2007) and *Gavazzi v. Romania* (2015), the interpretation theory resorts to the understanding of the award as an asset comprehended with other elements of the investment and not as a single investment itself.



This theory, with more acceptance as seen from previous decisions of *SOABI v. Senegal* (1984) or *Holiday Inns v. Morocco* (1974), takes into account the whole economic reality of an investment, not considering each asset as a singularity, but considering many operations as the complete investment in the host state (Classmeier, 2016).

Practitioners accept a more flexible protection regarding this theory due to the applicability of the theory to recognize awards as investments. This is, because, as stated above, if the tribunal adopts on ICSID proceedings, the double-keyhole approach and understand as an investment regarding its economic elements, parties will be in the position to accredit that the award fulfills with. However, considering this theory, the parties will be in the position to prove only the accomplishment of the requirements based on the solely whole economic activity.

For instance, the tribunal with *Saipem* stated that "for the purpose of determining whether there is an investment under Article 25 of the ICSID Convention, it will consider the entire operation." Regarding the particular case it stated that "the entire or overall operation includes the Contract, the construction itself, the Retention money, the warranty and the related ICC Arbitration" (Saipem v. Bangladesh, 2007).

This theory and the adopted interpretation of the different tribunals have allowed an easier way for investors to define an award as an asset subject protecting an entire investment, yet the consequence is not the understanding of the award as an investment by itself. The result allows the direct protection of the award as if it were an investment by itself.

SECTION TWO. NEGATIVE THEORY: ARBITRAL AWARDS CANNOT BE ADMITTED AS INVESTMENTS

The recognition of arbitral awards as investments is not unanimous. Investment tribunals have also denied the recognition of the awards as investments based on the characteristics of an investment, mostly considering the economic understanding of the term. This has been the reasoning of the two tribunals that have rejected jurisdiction over an award, the cases of *GEA Group v. Ukraine* and *Romak v. Uzbekistan*.

In the present Sub-Section, whether arbitral awards cannot be considered as an investment will be examined in two phases: first, regarding the fulfillment of the investment requirement, based on the double-keyhole approach of the interpretation of Article 25 of the ICSID Convention; The second phase will analyze the paradox of an actual enforcement that may generate a breach of an IIA.

1. Fulfillment of the investment requirements

Tribunals rejecting jurisdiction and practitioners alleging it have interpreted that an award under no circumstances contributes to an investment or develops an investment in a host state. Concluding that an award can only be constituted as the result of a dispute settlement mechanism and not as an investment, conceiving it as a legal instrument (GEA Group v. Ukraine, 2011).

Several ICSID and non-ICSID tribunals have opted to adopt the Salini test since it reflects investment (and economic) activities. Therefore, it is more flexible than the pure economic concept (Jung Engfeldt, 2014). For those tribunals, the test includes: (i) a contribution on assets or money, that (ii) involvement of a risk of the transaction, (iii) a certain duration, and (iv) a substantial contribution to the development of the state (Schlemmer, 2008).

Given the above stated reasoning about the "contribution on assets or money" requirement (Classmeier, 2016), in the present analysis this requirement will be omitted, and we will focus on the risk, duration and contribution to the development of the state requirements.

1.1. Double-keyhole (double-barreled) test: Interpretation of the economic definition of an investment.

Whether it is an ICSID tribunal that follows the interpretation of the Salini Test, or a tribunal governed by different rules that understand the investment in the economic sense, issuing an award will make the tribunal face the complexity of interpreting an award as an investment considering all the elements of its economic sense.

- *Assumption of risk requirement: a category for a non-enforcement risk.*

The risk of the economic activity may depend upon the contributions and performance of the project (Salini v. Morocco, 2001). This risk may not be limited to an ordinary commercial or business risk, but it must entail a derivate risk from additional elements that falls outside of the contractual performance made by the parties (Malaysian Historical Salvors v. Malaysia, 2007). Risks involved in an investment are not the same for every transaction. It may depend on the contributions and the business deemed by the parties (Jung Engfeldt, 2014)

A great concern arises regarding the categorization of an award as an investment. Since, the reference to such asset results from a settlement (some may say judicial) proceeding that have been developed based on the initial investment, the award by itself cannot be deemed as an investment on an economic industry. Therefore, there is a minor possibility that an award be deemed as an investment with no reference to the activity, there cannot be inherent risk related to the “performance”.

As a result, an award rather than entailing a commercial or business risk seems to entail no risk at all. However, an alternative may raise regarding this notion. It is the position of the present article, that the consideration of an award as an investment in the double keyhole approach requires a recognition of a risk based on an industry or a risk attributed to a relation with the state. As a result, it would be deemed that the risk regarding the enforcement or non-enforcement of an award may constitutes the investment risk, and therefore the accomplishment of the *Salini* requirement.

Given the recognition of the award as an asset and furthermore as subject to property (Kin-Sib and Maijic v. Serbia, 2010). Its recognition entails the risk of a denial. We can understand this risk as a particular risk regarding only commercial awards (which will be equivalent to a particular economic sector). Likewise, the risk will compel with being risk derivate to actions made by states. As a result, it may entail the proper risk of an investment and therefore comply with the criteria recognized by the *Salini Test*.

Regardless these criteria, resorting to tribunals that have dealt with this recognition, it has been denied any possibility that the award has a risk (Gavazzi v. Romania, 2015). Besides, those tribunals did not direct their attention to the non-enforcement risk as a possibility to comply with the *Salini test*, there is no precedent decision that recognizes the existence of such a risk.

Regarding the decisions that have recognized an award as an investment, it seems, that the only risk is not *per se* subject to protection, but the right to arbitrate recognized by the tribunal with *ATA*, where the risk was materialized on the possibility that a tribunal might deny the right to arbitrate by the annulment of the arbitration clause enriched in the contract (ATA v. Jordan, 2010).

Due to these interpretations, the enforcement of the award may be a possibility for practitioners to understand a risk inherent to awards as investments. However, to develop the concept, they must understand that it is not an easy path. First, it must be considered that the particular economic sector has been categorized for the asset will be the commercial awards, which rather than an economic sector it is a judicial sector (GEA Group v. Ukraine, 2011). Second, the risk balances between the tangencies of enforcement and non-enforcement of the award is not a common risk among investments.

- *Duration of the investment requirement.*

In this requirement, directly linked with the development of the investment (Grabowski, 2014), it has been found that instead of requiring a certain amount of time, while in some investments the duration may be illustrative specifically for some industries, it may be of less relevance for other industries (Jung Engfeldt, 2014).

The duration requirement for the investment is impossible to be met in the case of awards as investments. Considering the understanding set out above, the length of an arbitral proceeding may not make an understanding of the award as an investment. It exhausts the issuance and the enforcement of the award at one time. As a result, there is no project or investment that is developed in a certain amount of time in the host state.

Some may argue that once there is an award, the enforcement proceedings develop a duration enriched in the award and it misconceives such a position. The enforcement proceedings reflect more than a time of an investment but the time of a judicial proceeding. This is a common time among every jurisdiction subject to the proper characteristics of a country judicial system. Therefore, rather than making the duration of the investment, it makes a normal timing for every process in a country.

As a result, there is no possibility that considering the understanding of an award as an investment, criteria of the duration established for the *Salini test* is complied.

- *Contribution to the development of the host state.*

The last requirement of the Salini test and the most controversial one is the substantial contribution to the development of the host state economy. Regarding these criteria, tribunals have concluded that there is a positive impact when there are assertive activities as infrastructure construction (Salini v. Morocco, 2001), transferal of know-how (Jan de Nul v. Egypt, 2006) or the development of a specific industry as banking infrastructure (Ceskoslovenska Obchodni Banka v. Slovakia, 2004).

However, the result of the controversy regarding these criteria has been materialized on the recognition of the requirement as a must-be element of the *Salini test* for some tribunals and non-essential element for another tribunals (Jung Engfeldt, 2014).

This may be the hardest element to comply with awards as investments. Awards are decisions that, rather to make up a tangible contribution to a state, constitutes the settlement of a dispute.

Its accomplishment will depend more on whether the tribunal that faces a particular case considers itself that the substantial contribution to the state's development requirement is a must. Otherwise, that has the position that criticizes this requirement and therefore does not consider that it constitutes an investment, not demanding its fulfillment.

- Romak v. Uzbekistan: The progress on the requirements.

The first case where the recognition of an award as an investment is denied, or an asset linked to the investment, was the *Romak v. Uzbekistan* case. This tribunal, made under the UNCITRAL Arbitration Rules, found that an award does not comply with the definition of investment included neither in the relevant IIA, nor in the ICSID Convention. Therefore, it denied its jurisdiction.

The case arose on a contract for the importation of grain signed between Romak S.A. and the state of Uzbekistan. Due to the payments made for the contract performance, Romak filled an arbitration before the Grain and Feed Trade Association (GAFTA). This tribunal found in favor of Romak.

The company tried to enforce the award in two jurisdictions, and it failed. First, before the Uzbek state, which did not recognize the award based on a translation "requirement" set out in Article IV of the New York Convention. Second, before the *Tribunal de Grande Instance* of Paris (2002), which recognized the award. Then the Paris *Cour d'Appel* upheld the decision (2005). However, on the enforcement of the award, and based on a third proceeding, the Paris *Cour d'Appel* denied seizure of accounts on a non-identity basis on Uzbek Companies (2006). As a result, Romak filled investment arbitration.

Regarding the recognition of the award as an investment, the tribunal faced only the duty to analyze the accomplishment concerning the Switzerland–Uzbekistan BIT. However, by doing so, the tribunal stated that it "considers that the term [investment] under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period and that involves some risk" (Romak v. Uzbekistan, 2009).

Elements that have been stated above, reflect the Article 25 understanding the economic definition of investment (Salini v. Morocco, 2001). As a result, the tribunal found that the award did not constituted an investment, even though it did not analyze step-by step the set-out criteria.

The tribunal stated that there is no consent to arbitrate a dispute that does not comply with the elements of the economic definition of an investment (Romak v. Uzbekistan, 2009). The tribunal stated this assertion irrespective of the definition in the IIA. Thus, it stated that it was not obliged to develop an interpretation of investment as a difference from ICSID tribunals.

- *GEA Group v. Ukraine: A deny of a tribunal based on the ICSID Convention.*

The *GEA Group v. Ukraine* case constitutes the only ICSID known precedent of a tribunal that had denied the recognition of an award as an investment. Here, the tribunal, based its decision on the case of *Romak v. Uzbekistan* and it stated that it lacked jurisdiction because the award may not comply with the definition of investment in the IIA, nor in Article 25 of the ICSID Convention.

The context starts on a supplement contract concluded with an Uzbek company for the supplement of a certain amount of naphtha to the state. The state will transform it and then sell the final product. A dispute arose among the parties regarding an audit, which stated that several amounts of naphtha were missing. Noticing such a situation, the state took full responsibility, and the parties concluded further agreements regarding the compensation.

After the state did not comply with the compensation agreements, the claimant filled arbitration proceedings against the state. The tribunal, governed by the ICC Rules, found that the state breached the agreement and rejected the State's claimed jurisdictional objections.

Based on the ICC Award the Claimant filled enforcement proceedings in Ukraine, however, on the different judicial stages, including the Ukrainian Supreme Court, the response of the State was the same, a denial to enforce based on a jurisdictional argument over the ICC Award. As a result, GEA Group submitted investment arbitration.

Regarding the recognition in the investment proceedings, the tribunal stated that it cannot consider the award itself as an investment, since it is "analytically different" from the commercial agreements. The tribunal stated that the award was not an asset that contributed or was made in Ukraine and therefore it falls outside of the investment definition (GEA Group v. Ukraine, 2011).

Likewise, the tribunal stated that the ICC Award, rather than being an investment, is a legal instrument that provides a disposal of rights. Therefore, it cannot comply with the criteria established in the IIA, nor the ICSID Convention. There was no possibility to apply the transformation clause of the Switzerland–Ukraine BIT due to the nature of the award (GEA Group v. Ukraine, 2011).

2. The enforcement of an award as a breach of IIAs

Usually, the investment claims regarding an award as an investment are founded on a non-enforcement basis. Either there has been a denial of justice, a failure to provide effective means of asserting claims and enforcing rights (Sattorova, 2012), an arbitrary or discriminatory treatment (Kimerling, 2013) or a non-enforcement, non-recognition or annulment of the award (Priem, 2013). However, in 2009 there was a case awarded in which it based the claim on the actual enforcement of an award made by Lithuania.

In *Kaliningrad region v. Lithuania*, a dispute arose against Lithuania before the ICC, based on the Russia–Lithuania BIT. It founded the claim in the recognition made by the Lithuanian Supreme Court regarding a commercial arbitration in which the Russian region of Kaliningrad has been found guilty.

In the decision, the tribunal stated that the recognition of the commercial award as an investment and subsequently the responsibility of Lithuania regarding this point, would amount to state that a country by complying with the New York Convention, will be in violation of an IIA.

Kaliningrad pursued the claim before the *Cour d'Appel* of Paris, which dismissed its claims and ruled that under no circumstance the enforcement of an actual commercial award could amount to an IIA breach on investment arbitration (Priem, 2013).

Consequentially, the case of *Kaliningrad v. Lithuania* made a whole different interpretation regarding the development made by tribunals on arbitral awards conceived as an investment. The decision of the Paris *Cour d'Appel* and the investment tribunal were right on denying such a recognition to the award and the claims of Kaliningrad. Here not only there was no substantial basis for the claim, but such a recognition would have changed the understanding that before tribunals had been developing regarding the award as an investment.

To sum up, until the present section, we have analyzed the common definitions under arbitral awards may be considered as an investment, the developments made under the direct recognition through the "every kind of asset" definition, and the linked definition sorting to "claims to money", "claims of contracts having a financial value", "claims of rights to legitimate performance with a financial value" and the so-called "transformation" clause. Likewise, the crystallization and whole investment theories ease the recognition of the investment.

We have embarked on the situations under which we cannot consider an award as an investment. Under these circumstances we had analyzed the fulfillment of the investment requirements under the double-keyhole approach, the assumption of risk, the duration requirement and the contribution to the development of the state's economy. Interpreting treaties, tribunals finding a purpose to the definition of the award as investments and the actual enforceability of the award as a breach of the treaty.

That analysis allows us to conclude that because of the advances made by Tribunals, nowadays is possible to assert that the arbitral awards can be considered as an independent asset that makes up an investment, even though, trough the comprehension by itself, as an autonomous asset, a different investment or a consequence of the investment. Even though, that such a recognition is not a common interpretation through the double-keyhole approach, there is still a long path for practitioners, arbitrators and treaty-drafters in order to commonly incorporate the notion of awards as investments in investor–state arbitration.

In the following section, we will analyze the consequences of the acceptance of an award as an investment, the benefits for the promotion of foreign investments, the treaty drafters' challenges and the risks related to the investment definition of this category.

CONCLUSIONS

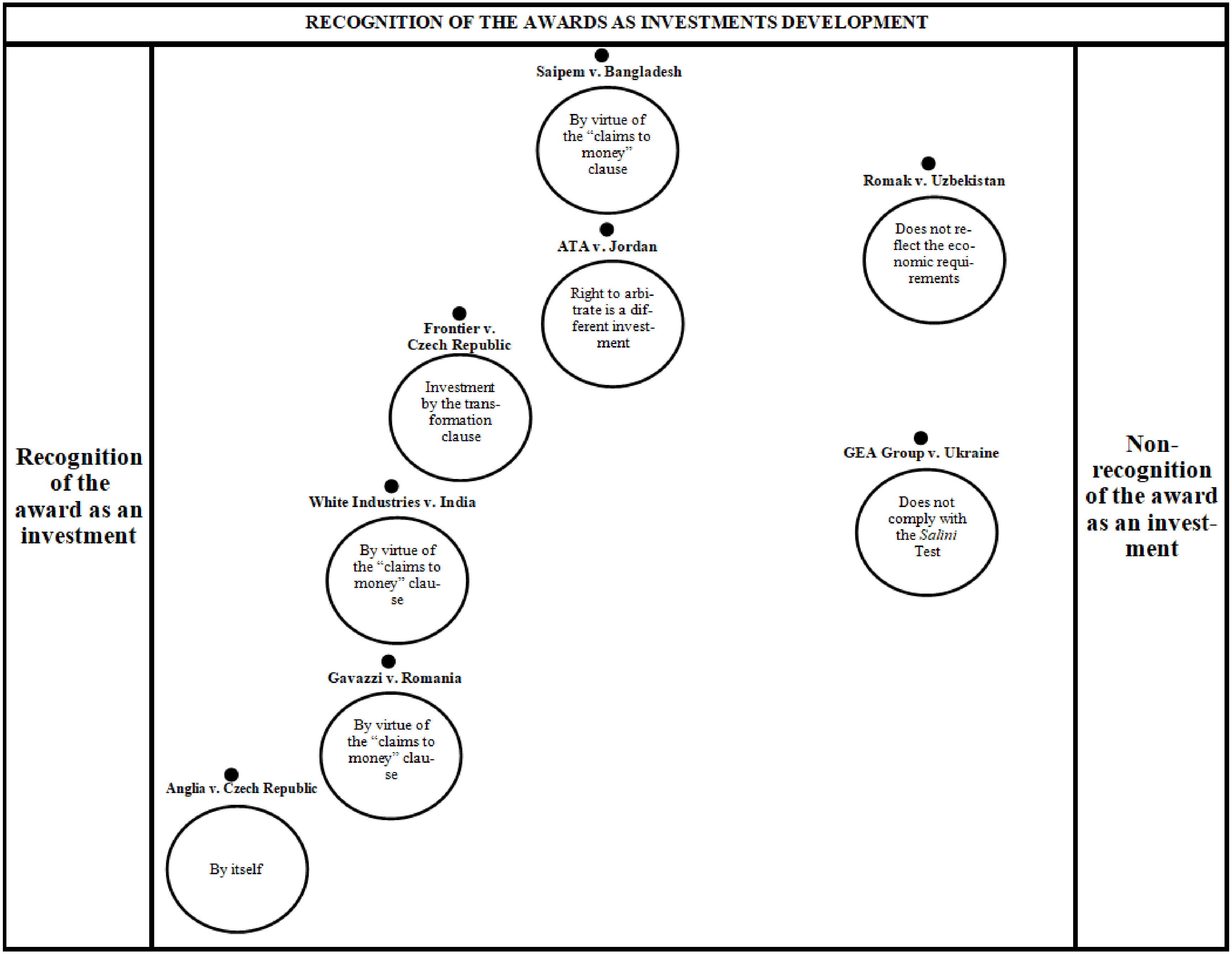
The categorization of commercial awards as investment has been a trend developed in the last fifteen years, in which by virtue of the different definitions included in the IIAs, the tribunal has tended to understand that the award constitutes an asset. This either by itself or linked to a form that an investment can constitute.

1. Line of decision's development

This recognition has been developed in the words included in the IIAs. Either the words are directed as "any kind of asset", "Claims to money and claims to performance contracts having a financial value" or "Claims to any other rights to legitimate performance having a financial value related to an investment" all of them have been concluded in the recognition of the awards as an investment.

Considering this development of the recognition of commercial awards as investments, the following chart summarizes the analysis conceived in the present study.

The methodology bases the chronological development from the tribunals that recognizes awards as investment on the left side of the column, starting with *Saipem* (2007), *ATA* (2010), *Frontier* (2010), *White Industries* (2011), *Gavazzi* (2015) and *Anglia* (2017); and tending to the right side the ones that have denied such recognition, *Romak* (2009) and *GEA Group* (2011).


RECOGNITION OF THE AWARDS AS INVESTMENTS DEVELOPMENT
Recognition of the award as an investment
Non-recognition of the award as an investment
Saipem v. Bangladesh
By virtue of the "claims to money" clause
ATA v. Jordan
Right to arbitrate is a different investment
Frontier v. Czech Republic
Investment by the transformation clause
White Industries v. India
By virtue of the "claims to money" clause
Gavazzi v. Romania
By virtue of the "claims to money" clause
Anglia v. Czech Republic
By itself
Romak v. Uzbekistan
Does not reflect the economic requirements
GEA Group v. Ukraine
Does not comply with the *Salini* Test

As stated in the introduction, the significance of commercial arbitration relies on the enforcement of the final arbitral awards. However, in recent years the non-recognition of these commercial awards has resulted in the recognition of investments materialized in the awards.

On a first stage, the recognition was based on the theories regarding economic activities, and as a result the *Saipem* tribunal faced to the recognition of an investment based on the clause of "claims to money" and to recognize the accomplishment considering the Article 25 of the ICSID Convention the tribunal resorted to the consideration of an overall economic activity regarding the investment.

Then, such recognition was followed by tribunals as Gavazzi and White Industries, which contributed to recognize it as an investment. The first one, regarding the economic criteria on an investment and the second one, based on the "crystallization of the investment" theory.

Yet, the recognition was regarding certain clause and theory, the tribunal in the case of ATA based its conclusion on a different rule. Based in the definition of rights for performance of a contract regarding an investment, the tribunal found that the right to arbitrate made an independent investment and protected the award directly.

Besides this recognition, and the apparently new line that the tribunal in *ATA* made, with *Anglia v. Czech Republic*, the development of this new category took a peek. Because of the sole definition of "every kind of asset" the tribunal found that it was sufficiently stated that an award can constitute an investment.

This recognition of the Anglia tribunal constitutes a major development for the recognition of commercial awards in investment tribunals. This achievement, as the decision of the Saipem tribunal is the first of its class, and therefore a reliable case for investment tribunals.

Interpreting Article 25 of the ICSID Convention and the adoption of an investment definition based on the economic elements of an investment have common grounds (Jung Engfeldt, 2014). Interpreting arbitral awards by resorting to this kind of test may arrive at the same conclusion: An arbitral award does not constitute an investment.

The reasoning of the *Romak* tribunal was accurate regarding arbitral awards. The promotion and protection of investments and the intention of states to promote the flow of private capitals produce as a result an award not to comply with the economic criteria around an investment.

However, a consideration must be made concerning the tribunal conclusion. The *Romak* tribunal states that Article 31 of the VCLT is a must-comply rule regarding any clause and that its application includes the three paragraphs of the article. Contrary to this position, interpreting a treaty must be made only if there is a necessity because of ambiguous language. When the ordinary meaning of the word is sufficient, there is no place to further interpretation (Gardiner, 2008). This tribunal does not acknowledge that the Switzerland–Ukraine BIT recognizes that a “claim to money” makes up an investment. Furthermore, it directly misplaced the “transformation” clause established in the BIT. Clauses under which an award can be considered as an investment.

As confirmed by the GEA Tribunal, an arbitral award does not amount certain risk, doesn't have a specific duration or contribute to the development of a country. Hence, it is a mere legal instrument that settles a dispute between two parties.

However, a strong critic among practitioners started to raise. Finally, the opposition to both of this reasoning was materialized by the tribunal with *White Industries v. India*, which stated:

"The Tribunal considers that the conclusion expressed by the GEA Tribunal represents an incorrect departure from the developing jurisprudence on the treatment of arbitral awards to the effect that awards made by tribunals arising out of disputes concerning "investments" made by "investors" under BITs represent a continuation or transformation of the original investment." (White Industries v. India, 2011)

After the *GEA*, the cases of *Gavazzi v. Romania* and *Anglia v. Czech Republic* recognized the existence of an investment on a commercial award. The first one also under the Article 25 of the ICSID Convention (directly disregarding *GEA*) and the second one, recognizing as a direct investment in the "ordinary meaning of the words".

2. Challenges for the conclusion of IIAs

The development that this document shows is how the specific words within the treaties are used to determine the scope of the definition clauses, and how each of these has opened the way for the existence of the awards to be determined as an investment in investment arbitration.

As described by Gardiner (2008) the interpretation of treaties must first be done with the literal interpretation of the terms. Thus, international treaty negotiators face a major challenge in order to achieve the protection or exclusion of commercial awards as an investment in arbitration.

In line with the above, it is important to highlight that in accordance with Article 26 of the VCLT states are obliged to comply with the provisions of the text of international conventions. Likewise, the commentary of Gardiner, confirmed by the Article 31 of the VCLT regarding interpretation of treaties. As stated in chapter one, both provisions are conceived as customary international law.

It is due to these customary international law rules that, with the development on the recognition of commercial awards as investment, the will of the states must be express, either to accept (Romak v. Uzbekistan, 2009) or to reject the recognition of a category of investment for tribunals (Frontier Petroleum v. Czech Republic, 2010).

States in a current trend have sought to reduce the understanding of an investment in an exhaustive list, either of what it constitutes, as well as, what does not constitute an investment (United Nations Conference on Trade and Development, 2011).

Due to the above, they have chosen to make an express exclusion of any type of decision, as well as a specific exclusion of international trade awards.

In relation to the first approach, it is worth bringing up the determinations of different treaties as in the case of the Free Trade Agreement signed between the United States and Korea, in which any type of claim is excluded (United States Trade Representative, 2019)

Likewise, in the drafting of model treaties for the negotiation of investments, trends of express exclusion are seen, such as that of the model BIT of Colombia (2017) which excludes any type of decision (Ministerio de Comercio Industria y Turismo, 2019)

The exclusion of awards as investment has also been made given expressed recognition of the existence of a commercial award as an investment (Pranshu, 2013). This is the case of India, a country that as mentioned before, after the *White Industries v. Australia* issued its model BIT excluding awards as an investment by excluding claims to money in relation to credits, order or judgements or any claim out of the treaty. (Government of India, 2019)

This concludes in an accepted challenge for countries and treaties' negotiators regarding the recognition of the category. Either, if the recognition is based on the exhaustive list of what constitutes an investment, or it is based on what does not constitutes so. Nowadays, states should express directly if it does not want the awards to be conceived as an investment and consequently expressly binding themselves on what they have conceived that it is in the extension of what the concept of an investment covers.

3. Risks over the recognition

In addition to what has been established above, it is necessary to take into account that although this category would have grant greater access to define awards as investments, associated risks are also present. These mainly related to international public order, specifically the provision on article 54 of the ICSID Convention, regarding the internal law recognition of the award.

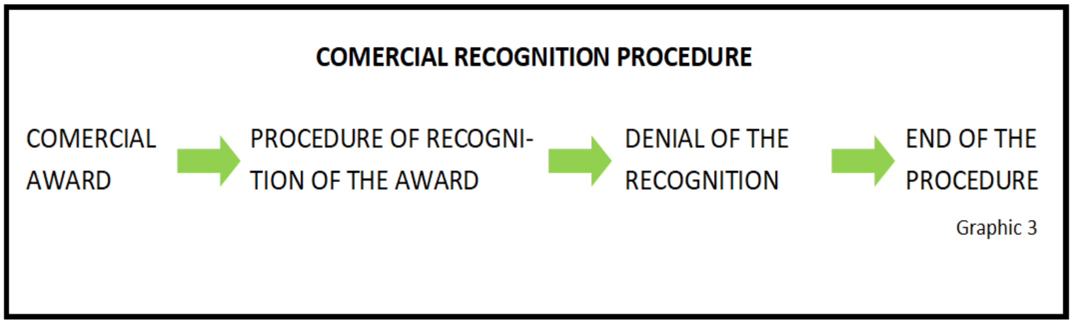
Article 54 of the ICSID Convention, establishes that direct recognition will be given to the decisions of the tribunals constituted under said agreement. It establishes such obligation in the following terms:

“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.”

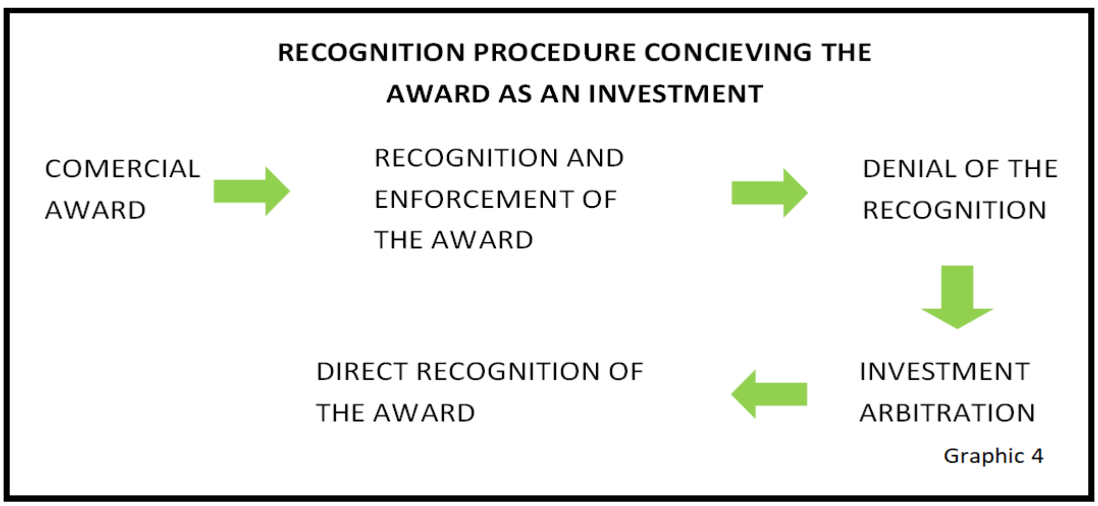
Based on the recognition as a direct decision of the state, there is no possibility that any organ of the state raise any objection in relation to the procedure of the arbitration. Likewise, the annulment must be submitted by before another ICSID tribunal and not an internal court. And with greater weight, there is no application of the New York Convention for the denial of recognition (International Centre for the Settlement of Investment Disputes, 2019).

This causes that the recognition of awards that have been denied by domestic law, but which has then been arbitrated under the ICSID Convention, can be later understood as recognized in domestic law because of the ICSID award’s nature.

In this sense, as can be seen from figure 3, the procedure is carried out as is usually done, that is, it has a final recognition by the local authority, which decides whether to recognize the commercial award according to the causes of Article V of the New York Convention.



However, as we observe in Figure 4, such decision by the local authority disappears and it will be the ICSID court that makes the last decision in relation to the recognition procedure.



What presents is an alteration to the current operation of commercial arbitration and the recognition of its decisions. Since the decision in investment arbitration can be directly recognized, the possibility of the state to decide if it does not recognize the award and consequently whether to proceed with investment arbitration.

As a result, the protection of awards is limited to the careful decision of the treaty drafters to include specific words in the definitions section of a treaty. A section that may seem simple but that constitutes the core of the IIAs. Thus, the will of states cannot be retrieve by the faculty of interpretation by Tribunals.

BIBLIOGRAPHY

Ampudia, R. (2015). Investment-Treaty Protection of Commercial Arbitration Awards: Lessons From the Jurisprudence. *American Review of International Arbitration, 553*(26), 553-590.

Anglia Auto Accessories Limited v. The Czech Republic, Arbitration Case V 2014/181 (Arbitration Institute of the Stockholm Chamber of Commerce March 10, 2017).

ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2 (International Centre for the Settlement of Investment Disputes May 18, 2010).

AWG Group Ltd. v. The Argentine Republic, UNCITRAL (International Centre for the Settlement of Investment Disputes April 9, 2015).

Azurix Corp. v. The Argentine Republic (I), ICSID Case No. ARB/01/12 (International Centre for the Settlement of Investment Disputes July 14, 2006).

Brownlie, I. (2008). *Principles of Public International Law* (Vol. Seventh). New York: Oxord University Press.

Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4 (International Centre for the Settlement of Investment Disputes December 29, 2004).

Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23 (Permanent Court of Arbitration February 27, 2012).

Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23 (Permanent Court of Arbitration February 27, 2012).

Classmeier, M. (2016). *Arbitral Awards as Investments: Treaty interpretation and the dynamics of international investment law.* The hague: Kluwer Law International.

Dolzer, R., & Schreuer, C. (2012). *Principles of International Investment Law* (Second ed.). Oxford, United Kingdom: Oxford University Press.

Duce, Maitena; Banco de España. (2003). *Definitions of Foreign Direct Investment (FDI): a methodological note.* Madrid: Bank for International Settlements.

Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3 (International Centre for the Settlement of Investment Disputes July 11, 1997).

Fernández Rozas, J. C. (2019). La doble instancia arbitral: un paradigma sin consolidar. In M. J. Menéndez Arias, *Anuario de arbitraje 2019* (pp. 1-48). Navarra: Civitas.

Frontier Petroleum Services Ltd. v. Czech Republic, UNCITRAL (Ad hoc, United Nations Comission on International Trade Law November 12, 2010).

Gardiner, R. (2008). *Treaty Interpretation.* New York: Oxford University Press.

Garnett, R. (2011). National Court Intervention in Arbitration as an Investment Treaty Claim. *International and Comparative Law Quarterly, 60*(2), 485-498.

GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16 (International Centre for the Settlement of Investment Disputes March 31, 2011).

Government of India. (2019, September 16). *Model Text for the Indian Bilateral Investment Treaty*. Retrieved from MyGov.in: https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf

Grabowski, A. (2014). The Definition of Investment under the ICSID Convention: A Defense of Salini. *Chicago Journal of International Law, 15*(1), 287-309.

Grotius, H. (2005). *The rights of War and Peace.* Indianapolis: Liberty Fund.

Guzman Martinez, D. (2019). Current Trends for the Definition of "investment" under the ICSID Convention: Revising the Double-Barrelled Approach. *Unpublished grade thesis*. Bogotá D.C.: Universidad Externado de Colombia.

Holiday Inns S.A. and others v. Morocco, ICSID Case No. ARB/72/1 (International Centre for the Settlement of Investment Disputes May 12, 1974).

Hollander, P. (2015). Report on the public policy exception in the New York Convention. *Dispute Resolution International, 10*(1), 35-50.

International Centre for the Settlement of Investment Disputes. (2019, September 16). *Reconocimiento y ejecución - Arbitraje en virtud del Convenio del CIADI*. Retrieved from International Centre for the Settlement of Investment Disputes: https://icsid.worldbank.org/sp/Pages/process/Recognition-and-Enforcement-Convention-Arbitration.aspx

International Law Comission. (2001). *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries.* New York: United Nations.

Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13 (International Centre for the Settlement of Investment Disputes June 16, 2006).

Jung Engfeldt, H. (2014). Should ICSID Go Gangnam Style in Light of Non-Traditional Foreign Investment Including Those Spurred on by Social Media? Applying an Industry-Specific lens to the Salini Test to Determine Article 25 Jurisdiction. *Berkeley Journal of International Law, 32*(1), 44-63.

Khanna, V. (2015). Current Trends in International Investment Arbitration. *Chicago Litigation Journal, 41*(3), 41-44.

Kimerling, J. (2013). Lessons from the Chevron Ecuador Litigation: The Proposed Intervenors' perspective. *Stanford Journal of Complex Litigation, 1*(2), 241-294.

Kin-Sib and Maijic v. Serbia, 12312/05 (European Court of Human Rights April 20, 2010).

Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3 (International Centre for the Settlement of Investment Disputes June 26, 2003).

López Medina, D. E. (2006). *El derecho de los jueces.* Bogotá: Legis.

Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10 (International Centre for the Settlement of Investment Disputes May 17, 2007).

Mansinghka, V., & Sanjana, S. (2017). Do Arbitral Awards Constitute 'Investment'? *Indian Journal of Arbitration Law*, *5*(2), 1-22.

Marco Gavazzi and Stefano Gavazzi v. Romania, ICSID Case No. ARB/12/25 (International Centre for the Settlement of Investment Disputes April 21, 2015).

McLahan, C., Shore, L., & Weiniger, M. (2007). *International Investment Arbitration: Substantive Principles.* New York: Oxford University Press.

Ministerio de Comercio Industria y Turismo. (2019, September 16). *Model BIT 2017*. Retrieved from MinCIT - Ministerio de Comercio Industria y Turismo: http://www.mincit.gov.co/temas-interes/documentos/model-bit-2017.aspx

Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2 (International Centre for the Settlement of the Investment Dispute October 11, 2002).

Myburgh, A., & Paniagua, J. (2016). Does International Commercial Arbitration Promote Foreign Direct Investment. *The Journal of Law and Economics, 59*(3), 1-50.

Paulsson, J. (2005). *Denial of Justice in International Law.* Cambridge: Cambridge University Press.

Petrobart Limited v. The Kyrgyz Republic, SCC Case No. 126/2003 (Stockholm Chamber of Commerce March 29, 2005).

Pranshu, P. (2013). Legal and Constitutional Justification of White Industries. *Indian Journal of Arbitration Law, II*(1), 76-86.

Priem, C. (2013). International Investment Treaty Arbitration as a Potential Check for Fomestic Courts Refusing Enforcement of Foreign Arbitration Awards. *New York University Journal of Law and Business, 189*(10), 189-220.

Romak S.A. v. The Republic of Uzbekistan, UNCITRAL PCA Case No. AA280 (Permanent Court of Arbitration November 26, 2009).

Rubino-Sammartano, M. (2014). *International Arbitration: Law and Practice.* New York: JurisNet, LLC.

Saipem S.p. A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07 (International Centre for the Settlement of Investment Disputes March 21, 2007).

Salini Costruttori S.p.A. and Istalstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4 (International Centre for the Settlement of Investment Diputes July 31, 2001).

Sattorova, M. (2012, January). Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct. *The International and Comparative Law Quarterly, 61*(1), 223-246.

Schlemmer, E. (2008). Investment, investor, nationality, and shareholders. In P. Muchlinski, F. Ortino, & C. Schreuer, *The Oxford Handbook of International Investment Law* (pp. 49-88). New York: Oxford University Press.

Schreuer, C. (2005). Fair and Equitable Treatment in Arbitral Practice. *Journal of World Investment Trade, 6*(3), 357-386.

Société Ouest Africaine des Bétons Industriels v. Senegal, ICSID Case No. ARB/82/1 (International Centre for the Settlement of Investment Disputes August 1, 1984).

Sourgens, F. (2015). Reconstructing International Law as Common Law. *George Washington International Law Review*, *47*(1), 1-56.

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II), ICSID Case No. ARB/03/19 (International Centre for the Settlement of Investment Disputes July 30, 2010).

UNCTAD. (2019, October 16). *UNCTAD Investment Policy Hub*. Retrieved from International Investment Agreements: https://investmentpolicy.unctad.org/international-investment-agreements

United Nations Comission on Trade and Development. (2019, August 20). *Austria Model BIT*. Retrieved from Investment Policy Hub: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4770/download

United Nations Comission on Trade and Development. (2019, August 20). *Macedonia Model BIT*. Retrieved from Investment Policy Hub: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4792/download

United Nations Comission on Trade and Development. (2019, August 20). *Model text for the Indian Bilateral Investment Treaty*. Retrieved from Investment Policy Hub web site:

https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements

United Nations Conference of Trade and Development. (2012). *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II.* New York: United Nations.

United Nations Conference on Trade and Development. (2011). *UNCTAD Series on Issues in International Investment Agreements II: Scope and Definition.* New York: United Nations.

United Nations Conference on Trade and Development. (2019). *World Investment Report 2019.* New York: United Nations.

United States Trade Representative. (2019, September 16). *Final Text | Korea US FTA*. Retrieved from Office of the United States Trade Representative: https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text

Untied Nations Comision on Trade and Development. (2019, August 20). *Czech Republic Model BIT*. Retrieved from Investment Policy Hub: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5407/download

White & Case. (2019). *2018 International Arbitration Survey: The Evolution of International Arbitration.* London: Queen Mary University of London & School of International Arbitration.

White Industries Australia Limited v. The Republic of India, Ad hoc (UNCITRAL November 30, 2011).